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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 261.

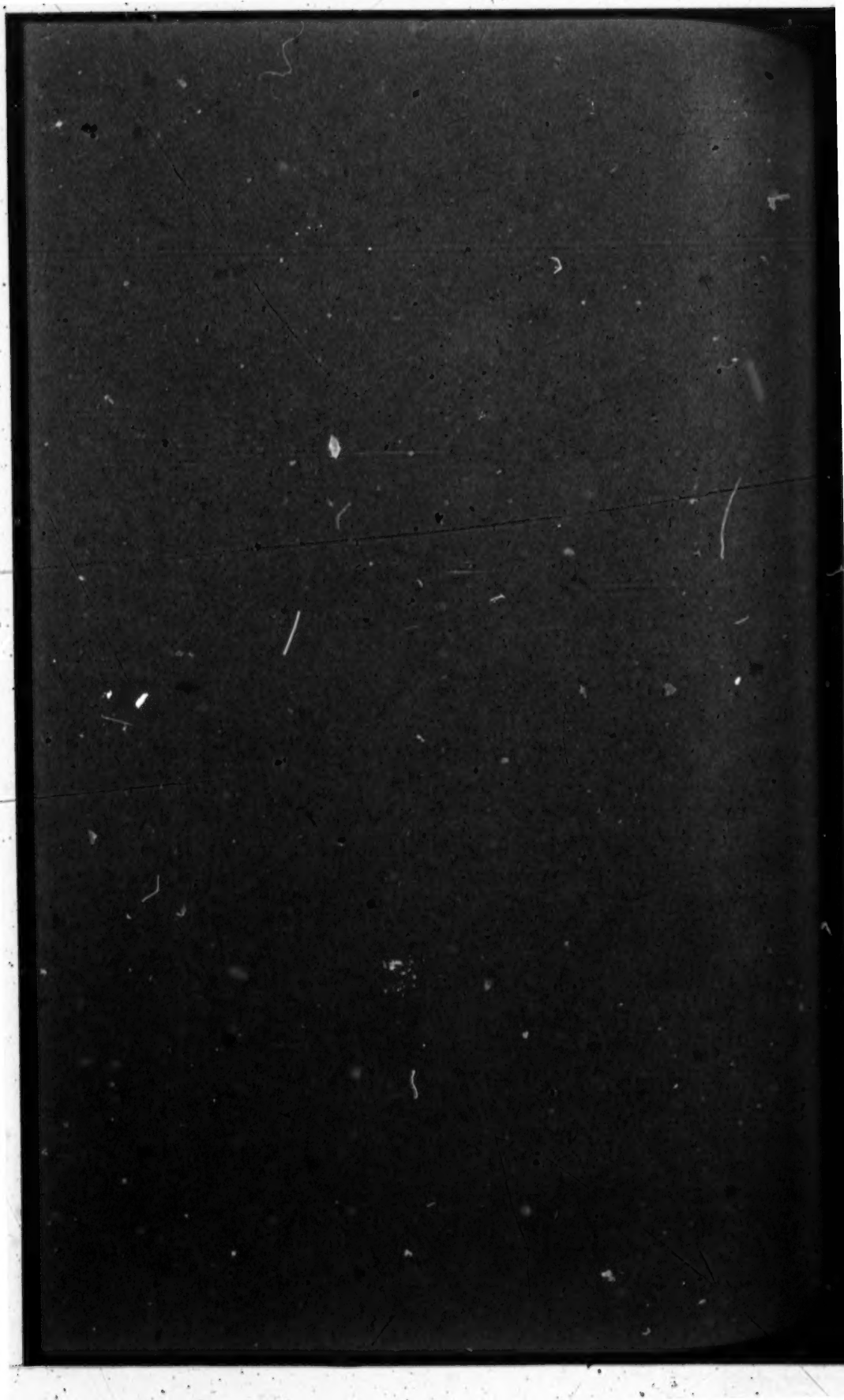
STANDARD MARINE INSURANCE COMPANY, LTD.,
Petitioner,

—against—

SCOTTISH METROPOLITAN ASSURANCE COMPANY, LTD.,
Respondent.

BRIEF ON BEHALF OF RESPONDENT.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Respondent.



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In re Columbia S. S. Co., 28 Fed. (2d) 540 (N. D. Ohio; Jones, *J.*); R. 86;
Standard Co. v. Scottish Co., 39 Fed. (2d) 436 (C. C. A. 6); R. 97; affirming District Court.

The Facts.

The petitioner's open policy (R. 20-29; 63), and the assured's declarations under it (R. 47, 60-61, and 63); and the respondent's Lake Contract (R. 46-56) and certificate of insurance (R. 58-59) are printed in full in the record.

The facts have all been found concurrently by both

Courts below and are set forth in their opinions (Opinion District Court, R. 86; Opinion Circuit Court of Appeals, R. 97).

As the facts are succinctly stated and concurrently found in the opinions below, we do not deem it necessary to enlarge this brief unduly by pointing out the numerous inaccuracies of fact, and assumptions outside the record, in counsel for petitioner's brief. Much of the evidence submitted to the courts below has been incorporated in an agreed statement (R. 41-61).

It is difficult to understand how it is possible for petitioner to question the concurrent finding of fact that there was no recovery of any "increased value" of cargo in the collision suit. The Trial Court's finding and certificate of that fact is final and conclusive as to what that Court's records in the collision suit contain. The petition which the petitioner filed in the Trial Court, and which is the proceeding involved here, is merely an excrescence grafted onto the collision suit after the collision recovery had been effected by the respondent in the assured's name. We emphasize this because counsel for petitioner bases his entire brief on the entirely unwarranted assumption that the petitioner may participate in the distribution of the fund without first establishing the fact that "increased value" as insured by it was recoverable and was in fact recovered by the assured in the collision suit. Neither of these assumptions is founded in fact or in law, or on anything in the record in the present case. Indeed, a careful search of the reported cases has failed to disclose any other case in which counsel for an "increased value" underwriter on cargo has even contended that it is entitled to sue, or participate in the suit, in the assured's name against a wrongdoer for collision damages.

Counsel for petitioner offered no evidence whatever in the Trial Court to support any of the alleged practices or usages he mentions in his brief. (See Petitioner's Brief, pp. 13, 14, 15 and 19.) Nor did the petitioner make any allegations with reference to them in the petition or pleading filed by it. If it had done so, we submit that opposing evidence would have conclusively established the non-existence of such supposed usages. Counsel for petitioner's argument is therefore in a substantial sense based on statements entirely outside the record.

The petitioner also has not alleged and has not introduced any evidence to show that the "increased value" which was insured in its policy was more than an arbitrary value, with an option to the assured to select the highest price during the period mentioned in the policy, without reference to actual value either at time or place of shipment or at time and place of expected arrival. By its declaration under the policy (Exhibit F, R. 60) petitioner interpreted this sliding scale as being applicable over a period of ten days. It is plain, as both Courts below have found, that if the petitioner's policy did assumedly represent an element of market value or cost at any place, that place was Montreal. Yet the stipulation and the record show specifically that no part of the expected price at Montreal was recovered from the wrongdoing vessel and that the collision recovery fund represents only the value at the port of shipment, Fort William, which was precisely what the respondent's policy insured in full on an agreed valuation. The assured could therefore recover under the respondent's policy only the exact full value at the port of shipment as agreed. The assured, having been indemnified in full to that extent by respondent, the latter was subrogated to the full

recovery of that precise sum and value from the wrongdoer; and the respondent did in fact maintain and effect that recovery in the assured's name under its right of subrogation. It is therefore necessary for counsel for petitioner, in order to maintain his position, to establish that the petitioner is entitled to recover more from the wrongdoer in the collision suit than the assured himself could recover. And counsel for petitioner's argument is also based on the unfounded assumption that the petitioner has greater rights against the respondent than the assured itself has. Long before declaration of this shipment under petitioner's policy, the assured had contracted that the respondent should insure the cargo to its full value on an agreed full valuation which was not capable of being increased or reduced either because of fluctuations in the market price or otherwise. The assured could not afterwards, without the respondent's consent—which was never asked for or given—increase or reduce the agreed insured valuation of the cargo by secretly applying to another insurance company for "increased value" insurance on a valuation which was (if construed according to petitioner's contention) higher than the agreed valuation in the respondent's policy. There is no usage authorizing such remarkable conduct by an assured and counsel for petitioner did not plead or offer evidence to establish such a usage.

The foregoing is entirely aside from and in addition to the fact that, as both Courts below have found, the petitioner's policy contained a clause which specifically provided that its insurance was not to be insurance, or to attach at all, in so far as any insurance had already been effected on the cargo with another company. We have been unable to find anything in the petitioner's brief to explain how, in view of that clause, its counsel's

present contentions are even worthy of consideration. The obvious materiality of that clause cannot be avoided by the attempt at page 23 of petitioner's brief to dismiss it summarily as immaterial. And at pages 25 and 26 of his brief counsel for petitioner in referring to clause 3 of petitioner's policy neglects to inform this Court that the "c. i. f. price" therein mentioned refers to *Montreal* and not to Fort William, the port of shipment. This conclusively appears from the invoices (Exhibits A and B, R. 45 and 46).

In view of the facts which were concurrently found by the Courts below, and which were based in every respect on the actual record before them, we submit that they were not only clearly right in holding that the petitioner could claim nothing by way of subrogation as to any increased value beyond that of the port of shipment, but that that was the only conclusion that they logically could have reached.

POINT I.

The fund involved in this controversy, the collision recovery, represents the value of the cargo at the time and place of shipment, Fort William, which respondent insured, and not the value at destination, Montreal. That fund constituted the whole subject matter insurable as cargo (Phillips on Insurance, §1226, §1229; Arnould on Marine Insurance, §365). The increased value occurring after sailing and during the lake voyage, which petitioner insured, could be realized only in the Montreal price after arrival at Montreal. The courts below, therefore, were clearly right in holding that the payment by the petitioner under its policy on increased value based on the "Montreal Quotation" was not a payment for any part of the cargo or its value as recovered in the collision suit, and no subrogation flowed therefrom.

In our statement of facts we have alluded to the fact that the petitioner's insurance was based on the Montreal price, and that its insurance was limited to "increased value" only. In Exhibit "F" (R. 60), in making its declaration, the assured stated that the insured value under petitioner's open policy would be "figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27, to which, of course, is added 5c. as provided for in the policy." Then in Exhibit "G" (R. 60-61) this Montreal value is figured at $1.64¾ and 5c. is added thereto because of the provision in the petitioner's policy, thus making the maximum agreed value on the Montreal quotation $1.69¾.

From this sum the C. I. F. invoice value is deducted, leaving a balance of 31¼c., thus supplying the agreed value at which the "increased value" was insured. It appears from the invoices, Exhibits A and B (R. 45 and 46) that the "c. i. f." referred to *Montreal*. It is thus evident that the insurance taken out by Dreyfus with the petitioner related to the Montreal value and not to the value at Fort William or Port Arthur, the place of shipment. And such difference between cost and price at Montreal was obviously nothing but hoped-for "profits" to be realized after arrival at Montreal.

The petitioner's entire argument is based upon a misconception of what is the proper value of cargo for insurance purposes. That value, according to marine insurance law and practice as settled from time immemorial, both in this country and in England, is the value at the time and place of shipment. In Phillips on Insurance, Section 1226, it is said:

> "The amount of insurable interest in goods is their market value at the time and place of the commencement of the risk.
>
> The best, though not conclusive, criterion, of this interest, is the cost of the goods to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences."

The reason that the value at the time and place of shipment is taken as the proper actual value of the cargo, both of cargo as the subject matter of insurance and of cargo in a collision case, is well stated in the case of *The Ocean Queen* (a collision case), Fed. Cases No. 10,409, page 555:

> "To estimate the damage by what the cargo

> would have sold for if it had reached the port of destination partakes in some measure of conjecture, and assumes that for certain which is after all contingent. The schooner in this case might never have reached her port of destination, even if she had not collided with the 'Ocean Queen.'"

Indeed, the rule that the recovery by cargo in a collision case is limited to the market value at time and place of shipment was adopted because of the insurance rule. See *Smith* v. *Condry*, 1 How. (42 U. S.) 28, 35, where this Court said:

> "It has been repeatedly decided in cases of insurance, that the insured cannot recover for the loss of probable profits at the port of destination, and that the value of the goods at the place of shipment is the measure of compensation. There can be no good reason for establishing a different rule in cases of loss by collision. It is the actual damage sustained by the party at the time and place of the injury that is the measure of damages."

It is because of the operation of this rule that the collision fund in court which the assured had recovered, represented only the value of the cargo at time and place of shipment. The difference insured by the petitioner represents a Montreal price at an indeterminate time subject to the option of the assured, *i. e.*, the petitioner insured the market value of the grain at Montreal, less prime cost, *i. e.*, invoice value at Fort William and Port Arthur, and not grain at Port Arthur. In other words, the subject of the petitioner's insurance was "increased value" on a Montreal price, as stated in its policy and

declaration Exhibit F (R. 60), and not a basic risk (R. 26), *i. e.*, the cargo at port of shipment. It is only the remainder of the fund in court, after deducting the respondent's claim in full, which represents any increase in value at time and place of shipment. As to that remainder, the controversy is solely between the assured, Dreyfus & Company, and the petitioner, and both courts below awarded it to petitioner.

In Section 1229, Phillips elaborates as follows:

> "The amount of interest in goods is most frequently the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost.
>
> A quantity of hides insured was invoiced at twelve cents per pound, which sum they were worth, but they had cost but ten cents; the court said, 'Generally speaking, the prime cost is the best rule by which to test the value;' and it was held that they should be estimated at ten cents. But the court said, 'The prime cost might not be a just rule where the goods had remained on hand a considerable length of time.' In such case the market price may have greatly varied; and the market price at the commencement of the risk is the true amount of insurable interest. The prime cost is not, therefore, conclusive proof of the value. Yet the court always leans in favor of the actual cost.
>
> Where the risk on cotton was to commence at the Isle of France, and it was invoiced at the value there, which was more than the cost to the assured, the court held that the interest was to be estimated according to the invoice.
>
> 'Suppose,' says Mr. Justice Washington, 'the

property to be destroyed within an hour after the risk has commenced (and the time makes no difference in principle), what does the owner lose? Precisely as much as it was worth, or would have commanded in the market at the time and place it was shipped. If the property cost him less than it was worth when shipped, he loses (in case of total loss), as well the first cost as the increased value, for which he is entitled to claim indemnity from the insurer. If it costs him more, he can have no claim under the contract (of insurance) for the difference between the first cost and diminished value. It is impossible that the first cost can furnish a just rule of indemnity, when it exceeds or falls short of the actual value of the property when it is put at risk. The invoice price furnishes no rule of indemnity in any case where it exceeds or is less than the market value."

In Arnould on Marine Insurance (11th Edition 1924), Section 365, it is said:

"The prime cost of goods is generally evidenced by the invoice price, but is not conclusively fixed by it. In the United States it has been laid down on several occasions, that the market price of the goods at the commencement of the risk, is the true basis of calculation, and that the prime cost or invoice price furnishes no satisfactory rule of indemnity in any case where it exceeds, or is less than, this market value. 'Suppose,' says Washington, *J.*, 'the property to be destroyed within an hour after the risk has commenced, what is it the owner loses? Precisely as much as it is worth, or would have commanded in the market at the time and place of shipment. If the property cost him less than it was

worth when shipped he loses (in case of total loss) as well the first cost as the increased value for which he is entitled to claim indemnity from the insurer.' In theory this is unquestionably true, but as a practical rule, the prime cost, as evidenced by the invoice price, is by far the most convenient standard."

The respondent's insurance covered the grain "Valued at $1.42 per bushel" (Exhibits D and E, R. 56 and 58). This valuation had in the earlier Lake Contract (Exhibit C, R. 46, at p. 54, clause 4) been built up on the basis of invoice plus ten per cent (freight being ignored because not involved in this litigation). Later, the assured, Dreyfus, took out insurance on what was termed "increased value" on the excess of Montreal quotation over c. i. f. Montreal price (R. 25, 45). Because the assured and the petitioner agreed upon a valuation of such increased value in excess of the market value at the time and place of shipment, there is an insufficient fund to reimburse both the petitioner and the respondent. The respondent had nothing to do with the valuation agreed upon by the petitioner and the assured. The respondent was in no way party to that contract, and no good reason can be assigned for penalizing the respondent because the petitioner and the assured elected to value the subject matter insured by petitioner at a valuation in excess of the market value at time and place of shipment. If as petitioner argues the agreed value in respondent's policy does not bind him, it follows, as a matter of course, that the agreed value in petitioner's policy does not bind respondent. Respondent's policy was the first to attach, and until petitioner's policy attached, the assured was a co-insurer for any excess in his insurable interest. But as appears from Phillips and Arnould his insurable in-

terest in the cargo was only the difference between the cost and the value at the time and place of shipment, that sum in any view was all that the assured had the right to insure except as profits. And as the recovery was limited to that sum it was as both Courts below held the only sum to which the petitioner could be subrogated.

In ruling as they did, both courts below acted in accordance with the view expressed by this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Company*, 279 U. S. 708, at page 712. There this Court said:

> "The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value. Within this limitation the policy is still a policy of indemnity and the insured must prove the sound value of the cargo in order to ascertain his actual loss, by deducting from it the amount of the proceeds of the damaged cargo. In every particular average adjustment the insurer may rely on the sound value of the cargo in order to establish the extent to which the insured is a co-insurer."

The Court in this passage is speaking of particular average losses. Here we have a total loss. As we have shown from Phillips and Arnould, in a case of total loss, where there is no agreed valuation, the adjustment is based upon either the prime cost or the value at the time and place of shipment. What happened here was that for the practical reasons mentioned by Arnould, the cargo as such was insured at an agreed value, based upon the prime cost (R. 54). Conse-

quently, in so far as the cargo is concerned, there was in effect no co-insurer. But if the view should be taken that the assured was a co-insurer in respect of the difference between the cost and the value at the time and place of shipment, the assured even under such a view would be only a co-insurer in so far as respondent's insurance was less than the value at the time and place of shipment. If, as petitioner urges, his policy be considered as a policy on cargo, it can be such a policy only in so far as it relates to so much of the cargo for which the owner was a co-insurer after the assured had concluded his bargain with respondent. Both courts below permitted the petitioner to be subrogated in respect of such sum, and, as the Circuit Court of Appeals said, this was the only sum which the assured had to which petitioner could be subrogated. For after the assured had fully insured the grain at its prime cost, nothing remained for insurance in so far as the insurable value of the grain was concerned, other than the difference between the prime cost and the value at the time and place of shipment. The fact that the assured elected to tack on to such insurance an insurance on profits anticipated at destination, certainly in no way can affect respondent.

The rule laid down in *Smith* v. *Condry, supra,* has been repeatedly followed. In *The Vaughan* and *Telegraph,* 14 Wall. (81 U. S.) 258, 267, this Court said:

> "In the District Court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is *the value of the goods at the time and place of shipment.* It was conceded that upon the breach of a contract for the delivery of goods at a particu-

lar place the measure of damages is the full value of the goods at such place. Both propositions are correct and are well-settled in our jurisprudence."

And in *The Scotland,* 105 U. S. 24, 35, this Court said:

"The question raised as to the rule of damages which should be adopted, in estimating the actual loss of the owners of the guano, was properly decided by the Circuit Court. The rule is, the prime cost or market value of the cargo at the place of shipment, with all charges of lading and transportation, including insurance and interest, *but without any allowance for anticipated profits.*" (Italics ours.)

See also *The Umbria,* 59 Fed. 489, 490. And see *The Aleppo,* 1 Fed. Cases No. 158, Southern District of New York, where the Court said:

"The exceptions raise the question, whether the allowance for loss of cargo ought to be the market value of it in Boston at the time of the loss, less freight, duties, and charges for lading; or, whether it should be only the actual cost of the cargo when on board of the vessel at the port of shipment (including expense of lading), which may be regarded as its market value when on board, at such port, *without any addition for any increase in the market value* of like cargo at such port, occurring prior to the time of the loss; or whether it should be what the report allows, namely, the actual cost when on board of the vessel, at the port of shipment (including expense of lading), with the addition of the increase in the market value of like cargo at such port occurring prior to the time of the loss. * * *

All these considerations lead to the conclusion that profits, on the supposition of the prosperous termination of the voyage, ought not, in any case, to constitute an item of damage."

And again in *The Aleppo*, 1 Fed. Cases No. 158, at pages 345 to 347, it is said:

"The libellants, in supporting their exception, contend that the proper measure of damages is the market value of the wool in Boston, on the day of its loss, less duties, freight and charges for landing, and less also (an item not referred to in their exception, or before the commissioner) the reasonable cost of insuring the cargo from the place of loss to Boston. They insist that this would give the value of the cargo at the time and place of its destination, and would be in accordance with the rule laid down in *Smith* v. *Condry* (1 How. (42 U. S.) 28). But this construction of the rule would fritter it away altogether. * * *

It is contended by the libellants, that *Smith* v. *Condry* (*supra*), is overruled by *Williamson* v. *Barrett* (*supra*), if the former case is to be considered as laying down the rule, that *increased values* or expected profits or earnings can never be allowed as damages in collision cases. It is sufficient to say, that the supreme court, and the judges who concurred in the opinion of the court in the latter case, have never regarded the latter case as overruling the former. Mr. Justice Nelson, who delivered the opinion of the court in the latter case, cites the former case, in *The Ocean Queen* (*supra*), as settling the rule which is to govern on like questions in all cases of marine torts. In the case of *The Vaughan* and *The Telegraph* (*supra*), the su-

preme court sanction the rule which in the same case, I had, on the authority of *Smith* v. *Condry* (*supra*), adopted; and in the very next case in the same volume (*The Cayuga,* 14 Wall. (81 U. S.) 270), the same court maintains the doctrine of *Williamson* v. *Barrett* (*supra*), that reasonable demurrage, for unavoidable detention while repairing an injured vessel, is a proper charge in all suits for damages by collision. * * *

It is equally impossible to sustain the rule of damages adopted by the commissioner. The general *increase in market* value, between the time of shipment and the time of the collision, was claimed and disallowed by the circuit court for this district, in the case of *The Ocean Queen* (*supra*). I should feel bound by that decision, so long as it was not overruled, even if I did not concur in its propriety. But it seems to me a correct decision. No principle of *restitutio in integrum,* or of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place, or of giving him the actual damage sustained by him at the time and place of the injury, or of giving him indemnity to the extent of the loss sustained—as the general rule is thus variously expressed—requires or admits an allowance made on the principle adopted by the commissioner in this case. * * * It had, however, no further value to them, at that place, and their actual loss was nothing more than such money, with interest. Restoring to them that money, with interest, restores all they actually lost. *All beyond that was expected profits.* The wool was not in Montevideo, so as to have applied to it *any increase in market value, after it left there,* which might have applied to it if it had remained

there and been sold. *The increase in value after it left there, and while it was on the voyage based on an increase in the value there of like wool is as much contingent as an increase in its value* based on a price of like wool in Boston, at the time of the loss, higher than the price paid in Montevideo. The value of the wool to these libellants at the time and place of the loss, was only what it cost them to buy it and convey it to the place of loss, with interest. So, too, they cannot be allowed for any increase in market value at Montevideo or other place of purchase or shipment, between the time of purchase and the time of shipment. The rule is one which must operate uniformly in all cases."

See also *The Old Reliable,* 262 Fed. 108, 110 (C. C. A. 4) and *Guibert* v. *British Ship George Bell,* 3 Fed. 581, 584-585.

We have quoted at length from these authorities, to make it clear that in a collision case an increased value, such as the petitioner insured, is excluded from the recovery, because of its conjectural nature.

As we shall show later in discussing the case of *Canada Sugar Refining Co.* v. *Insurance Co.,* 175 U. S. 609, and *Strass* v. *Spillers,* Law Reports (1911), 2 King's Bench Div. 759, profit or increased value policies have come into use for the purpose of permitting a merchant to insure his profits. Hamilton, *J.* (now Lord Sumner), said, in *Strass* v. *Spillers, supra,* this is a common form of insurance. It is, as Hamilton, *J.*, said, a form of insurance ancillary to the trade in grain, for the purpose of protecting the assured in respect of a loss of increased value, or profits. But, to say as petitioner does in its brief, that an increased value cover is

an insurance on cargo, as if both policies were unvalued, is a misconception of the fundamental principles of insurance. If the agreed value in respondent's policy is to be disregarded, then both policies must be treated as unvalued, and then the assured's right of recovery must be limited to actual value at time and place of shipment—*Smith* v. *Condry, supra*; Phillips on Insurance, § 1229; Arnould on Marine Insurance (11th ed.), Section 365.

The parties are placed in a position where there are insufficient funds to pay them both, because the assured and the petitioner had agreed upon an arbitrary value as the value of the "increased value" insured by petitioner. Such value is in excess of the value at point of shipment, the measure of loss but for that agreement as to value. Both Courts below held that the assured could only subrogate the insurer in respect of rights which the assured had. This is the well established equity rule.

In *Phoenix Insurance Company* v. *Erie and Western Transportation Company,* 117 U. S. 312, at page 320, this Court said:

> "When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them,

> is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods, or from damages paid by third persons for the same loss. But the insurer stands in no relation of contract or of privity with such persons. *His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter.*" (Italics ours.)

The subject matter of insurance here effected by the petitioner was the "increased value". It was so specified in the petitioner's policy. The policy provided that it was to cover "increased value" on grain, and that such increased value was to be arrived at by taking the difference between the C. I. F. invoice cost and the highest market value per bushel, plus 5 cents, as set out in The New York Journal of Commerce, at the port of final delivery. The assured, in making their declaration, which was accepted by the petitioner, stated the Montreal price as the market value contemplated in the contract. This declaration was accepted and the loss was subsequently adjusted on the declaration so made. The subject matter of the petitioner's insurance, therefore, was the difference between the C. I. F. price and the highest Montreal price during a period of ten days after shipment.

Such a subject matter of the insurance was identical with that described in *Canada Sugar Refining Co.* v. *Insurance Co.*, 175 U. S. 609, at page 625, where such an interest was under discussion by this Court. This Court quoted with approval the following language from Phillips on Insurance:

> "The profit, then, which is the subject of a

> policy upon this interest is the excess of the value of the subject at the port of destination over its value at the shipping port."

In *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (1916) 1 K. B. 30, 13 Asp. Mar. Cas. 221, Scrutton, *J.*, now one of the Lord Justices of the Court of Appeal and one of the most eminent English authorities on the law of insurance, held that an underwriter was only entitled to subrogation TO THE EXTENT TO WHICH ~~IT~~ HAS PAID IN RESPECT OF THE SUBJECT MATTER INSURED.

To recapitulate:

The declaration (Exhibit F at p. 60 of the Record) and the debit note (Exhibit G at p. 60 of the Record), on which the appellant computed and paid the loss under its policy, show that what it insured was the value on October 27th, the day of highest quotation during ten days after shipment, not of this cargo of wheat which was on that date at Fort William, but of a similar quantity of wheat on that date at Montreal.

> "Insured value under our Assured's Open Policy will be figured on the basis of the highest C. I. F. Montreal quotation during the ten days from October 27th, to which, of course, is added 5c, as provided for in the policy" (R. 60).
>
> "Highest market value on October 27, $1.64¾ per bushel, plus 5c—$1.69¾" (R. 61).

On that same date, October 27th, the value of this cargo on the "Glenorchy", which was then at Fort William, was only $1.54¾ per bushel, and that is all that

was recovered in the collision suit (R. 10). The difference between the value $1.54¾ per bushel—of this cargo on the "Glenorchy" as it existed at Fort William on October 27th, and the value of a hypothetical similar quantity of wheat at Montreal on the same date—$1.64¾—is ten cents per bushel. This difference was not recovered in the collision suit and is the difference or increase in value which the appellant insured. It is obvious that the increased value which the appellant insured was the anticipated profit which appellant's assured expected to derive if the cargo actually arrived at Montreal. But it is just this element of anticipated profit which would not be insured except for the agreement which appellant made as to value, and which is not recoverable in a collision suit and which was not recovered here.

This Court held long ago that a cargo owner could establish a total loss under a policy on profits by merely showing that the cargo did not in fact arrive at destination without showing that the cargo or any part of it was lost. *Patapsco Ins. Co.* v. *Coulter,* 3 Peters (U. S.) 222.

POINT II.

The subject matter of petitioner's policy, was not goods or merchandise, but "increased value" based on excess of Montreal quotation or market price over c. i. f. Montreal price,—that is, profits hoped to be realized if the grain should ever reach Montreal,—and as nothing has been recovered by the assured in respect of increased value, there is nothing to which the assured is subrogated.

In the British Marine Insurance Act, 1906, Section 16 (Act of Parliament, Dec. 21, 1906, 6 Edw. VII, ch. 41), it is provided:

> "Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows: * * *
>
> (3) In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole. (See *Usher* v. *Noble* (1810), 12 East, 639, 646; *Tuite* v. *Royal Exchange Co.* (1747), 1 Park 224, 225; 1 Marshall on Insurance, 232; Stevens on Average, 178 *et seq.;* Benecke, Pr. of Indem., 12-14; 2 Phillips on Insurance, s. 1232.)
>
> (4) In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

In Sea Insurance by William Gow, London, 1914, page V, it is said:

> "The object of the introducers of that Act [the British Marine Insurance Act, 1906] was

> to reproduce as exactly as possible the law as it then existed without making any attempt to amend it. Consequently, the Act, except in one or two minor particulars, gives in a systematic form the results of all important decisions rendered by English courts in matters of Marine Insurance."

See also Arnould on Marine Insurance, Eleventh Edition, Section 365 (quoted *supra*, p. 10).

It is clear from the definition contained in the statute, which is a codification of the English Law of Marine Insurance, that the subject matter of the respondent's insurance, being an insurance on 100 per cent. of the grain (R. 54), and being valued at the prime cost of the grain, was goods or merchandise. It is equally clear that the subject matter of petitioner's insurance was not goods or merchandise, but was another subject matter (R. 25).

In the recent case of *Loders* v. *Bank of New Zealand*, 45 Times Law Reports 203; 33 Lloyd's List Law Reports 70 (King's Bench Division) decided January 25, 1929, the Court held that a policy on "increased value of copra" (p. 71) was not a policy on the copra itself, and, therefore, was not a sufficient tender of a cargo policy under a C. I. F. contract. The policy in that case described the subject matter insured as follows:

> "On freight payable at destination valued at £325 being INCREASED VALUE OF COPRA through payment of freight or from such time as freight becomes due at destination. THIS INSURANCE BEING DEEMED TO BE PART OF THE TOTAL AMOUNT INSURED ON THE COPRA VALUED AT SUCH TOTAL AMOUNT" (p. 71).

Mr. Justice Wright, delivering judgment, held this was a policy merely

> "on the increased value of the goods insured consequent on the payment of the freight at destination. It is clear, therefore, that instead of insuring the goods under this policy simply at a valuation of £27 5s. plus 5 per cent. the insurance has been effected in this way which I have indicated, that is to say, it is on the goods valued at £27 5s. less £3 5s. as in respect of freight and plus 5 per cent. on that valuation. Then the freight, as I have said is a separate amount.
>
> Now the buyers objected to that policy and the matter came before the arbitration tribunal. What the buyers said when the policy was tendered when they were objecting to it was this: 'The contract clearly states that the copra is to be insured for the contract price plus 5 per cent. It was not so insured, * * *.' Surely sellers cannot seriously suggest that the London Copra Association, had it intended to provide for insurance for invoice price plus 5 per cent. and in addition the amount of the freight as increased value, such increased value to attach as an additional insurance upon the goods from the time the freight became due, would have used the wording it does use of 'contract price plus 5 per cent.'" (p. 74).

Mr. Justice Wright further said at page 75:

> "The contract, to my mind, is absolutely clear. It provides for insurance at a contract price plus 5 per cent. on the net shipping weight, and the contract price, as I have already said, for the reason which I have already stated, in this con-

tract means £27 5s., and therefore the policies ought to have been simply policies on the goods valued at £27 5s. per ton. The arbitrators, in my judgment, were right, both in fact and in law, in holding that the policies in question were not a good tender under the contract in this case."

In *Strass* v. *Spillers*, Law Reports (1911), 2 King's Bench Division 759, the Court held that a policy taken out by the shipper on "increased value" of a cargo of wheat was not a policy on the cargo itself and therefore that the shipper need not deliver that policy to the buyer under a C. I. F. contract with the cargo policies and was himself entitled to retain permanently any money collected under the increased value policy in case the cargo should not reach destination, notwithstanding the loss occurred after the shipper had sold the goods to the buyer. This decision is squarely in point to the effect that the subject matter of a policy on increased value of cargo is not cargo. The syllabus in that case reads as follows (1911) 2 King's Bench Division, at page 759:

> "The defendants bought a cargo of wheat at a price to cover cost, freight and insurance under a contract which contained the clause 'Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only.' In order to fulfill the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the above clause. The plaintiff handed over to the buyer from him a policy for 2 per cent. over the invoice amount, and this policy was handed

over to the defendants in due course. The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, which policy he retained in his own possession. A loss having occurred the underwriters paid the defendants the full amount under the policy which had been handed over to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the underwriters the amount payable thereunder. The defendants did so, and upon being paid the amount by the underwriters they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use;

Held, that, as the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, the defendants were not entitled to it under the contract, and that the plaintiff was entitled to recover the amount received by the defendants thereunder as money had and received to his use."

The Court in that case held that if the policy on increased value of cargo had been tendered to the buyer as one of the policies under the C. I. F. contract it could properly have been rejected by the buyer on the ground that IT WAS NOT EXPRESSED TO BE UPON CARGO, BUT UPON INCREASED VALUE OF CARGO (at p. 768 of (1911) 2 K. B. D.). Referring to the increased value policy, the Court held that:

"It is to be observed that the policy is ex-

pressed to be ON INCREASED VALUE: to pay as cargo, showing that IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO. * * * It was a legitimate speculation, carried out by means of honour policies, in view of the rise in the market value of wheat, which might lead the plaintiff to desire to have further business protection than the other policies would give him. An experienced broker at Lloyd's was called, whose evidence was not in any way challenged, and he stated that this form of insurance is common, NOT AS A MODE OF INSURING CARGOES, BUT, AS I UNDERSTOOD HIM, AS ANCILLARY TO THE TRADE IN GRAIN" (pp. 768 and 769 of 1911, 2 K. B. D.).

And referring to the contention of the buyer in that case (the appellant in the present case), the Court said, at page 774 of 1911, 2 K. B. D.:

> "They must have appreciated from the terms of the policies that this was not the kind of policy which is tendered for payment by an ultimate receiver of the goods, but is such a policy as is tendered by persons who wish independently to insure the goods to protect themselves against the fluctuations of the market."

Mr. Justice Hamilton, delivering judgment in the *Strass* case, said (1911, 2 K. B. D. at pp. 767 and 768):

> "This is an action to recover two sums amounting together to £652 19s., which the defendants have received from the British and Foreign Marine Insurance Company and the London Assurance Corporation respectively on two policies effected by the plaintiff, called increased value policies. The plaintiff's claim is for damages for conversion, and alternatively for money had and received to

his use. The defendants in answer allege that they were entitled to receive the policies from the plaintiff, and that, having collected the moneys due upon the policies, they are entitled to retain them for their own benefit.

The claim arises out of a contract for the sale of a cargo of Australian wheat. On December 30, 1908, the defendants, through Harris Brothers, a firm of brokers, bought from Messrs. Dewar & Webb a cargo to arrive which was to be shipped under bills of lading to be dated January and/or February, 1909. Ultimately the cargo which was declared to them was that by the sailing vessel 'Leon Bureau'. There had been other dealings with the cargo before it reached British waters, and in particular by a contract in similar form, dated March 16, 1909, Messrs. Allatini had bought the cargo from the plaintiff, and they by a contract in similar form of the same date sold the same cargo to Messrs. Dewar & Webb, who thereby fulfilled their contract of December 30, 1908, with the defendants. The vessel, bound for a Bristol Channel port, went ashore on the coast of Cornwall and sustained considerable damage, but there was ultimately such salvage that the claim in respect of the cargo was only for particular and general average. The adjustment in respect of the loss was made on August 26, 1909, and on the following day the underwriters on the policies on cargo paid the losses. The policies, which were handed over by the plaintiff and which ultimately reached the defendants and were accepted by them as being the policies they had to receive under the contract, did not include two policies on increased value, namely, one for £2,000 dated February 9, 1909, and the other for £492 dated February 27, 1909, and after the loss

on the cargo had been adjusted the plaintiff made a claim upon these two policies. In them the voyage was expressed in terms which covered the voyage of the 'Leon Bureau', and they covered the contracts of sale. The subject-matter was '£2,000 —in the other policy £492—increased value on about 12,439 quarters wheat in 28,002 bags. To pay as cargo, but in case of general average to pay only the amount applying to the excess of contributory value over the other insurances effected on the cargo itself; without benefit of salvage;' warranted free from average unless general or the ship be stranded. It is to be observed that the policy is expressed to be ON INCREASED VALUE; to pay as cargo, showing that IT IS NOT IN THE ORDINARY SENSE A MERE INSURANCE ON CARGO * * *."

In *Canada Sugar Refining Company* v. *Insurance Company of North America*, 175 U. S. at page 625, this Court quotes with approval the following passage from Phillips:

> "The profit, then, which is the subject of a policy upon this interest *is the excess of the value of the subject at the port of destination over its value at the shipping port.*"

The word "profits" means the difference between the actual cost and the selling price, *Cooke* v. *Cain*, 35 Wash. 353, 77 Pac. 682, 683.

The term "profits" has reference to the gain which a seller would have made if he had been permitted to complete his contract. *Gardner* v. *Deeds*, 116 Tenn. 128, 92 S. W. 518, 519, 4 L. R. A. (N. S.) 740, 7 Ann. Cas. 1172 (adopting definition in *Philadelphia Co.* v. *Howard*, 13 How. (54 U. S.) 307):

> "Earnings expended on a new structure may or

> may not be 'profits'. Whether they are or not depends on other things to be taken into the account besides the mere fact of such expenditures. *Grant* v. *Hartford Co.*, 93 U. S. 225, 228."

For definition of "profits" see *Mobile Co.* v. *Tennessee*, 153 U. S. 486, 14 Sup. Court 968, 971.

Similarly in the present case, the increased value insured by the petitioner, was in legal effect "profits", because it did not represent an actual value or expenditure or investment made. The increase in value could not occur until the wheat should arrive at Montreal and thus earn and bring into existence that value. The only conclusion to be derived from this state of facts is that reached by both Courts below, viz., that as there had been no recovery in respect of such increased value, there was nothing to which the petitioner could be subrogated in respect of such increase. This conclusion is fully supported by the parties' own interpretation of the contract. After the loss, the petitioner and the assured amended their contract of insurance, and stated that the policy had been altered from inception to cover shipments termed "increased value" only and not basic risks, and agreed that the petitioner should waive its right to participate in any salvage realized from the sale of damaged grain (R., 26). If the parties had intended that the insurance was in fact an insurance on grain, then they would not have inserted such a provision in their contract. The insertion of this provision shows that both the assured and the petitioner understood that the subject matter of the insurance was not goods or merchandise.

In an effort to sustain his position, counsel argues that the insurance in *Canada Sugar Refining Co.* v.

Insurance Company, supra, was not the same as that granted by the petitioner to its assured. In the *Canada Sugar Refining Company* case, the facts were that 2,462 tons of sugar were shipped from the Philippine Islands to Montreal, which were insured with the Atlantic Mutual Insurance Company for $166,145. Later, while the carrying vessel was on voyage, when the assured ascertained that the then value of the sugar was $181,000, it took out with the Insurance Company of North America, a policy on profits, valued at $15,000, thus making the insurance precisely the same in amount as the value at risk. The facts in that case in this respect are identical with the facts here, except that in the *Canada Sugar Refining* case the excess cover is called "profits", whereas here such excess cover is called "increased value". In the *Canada* case it does not appear that the Atlantic Mutual valuation constituted the prime cost, but it does appear that the actual value of the sugar at the time when the policy on profits was taken out, was the aggregate of the two sets of insurances. This Court held in that case that the profits insurance was in fact an insurance on profits and not cargo, although it appeared there that the value of the sugar was equal to the aggregate of the two insurances (p. 611 of 175 U. S.).

This Court then quoted from Phillips on Insurance, as follows:

> "Under a policy on the profits of a cargo on a voyage from Philadelphia to the Mediterranean, and thence to South America, valued at $20,000, the ship and cargo were destroyed by fire at Gibralter. It was held (*Patapsco Ins. Co.* v. *Coulter,* 3 Pet. 222) that the assured was entitled to recover the whole amount of the valuation against the underwriters, without proving that there would have been any ultimate profit on the voyage, if it had been pursued without interruption

or disaster. And this is the prevalent doctrine in the United States. * * * *The profit, then, which is the subject of a policy upon this interest, is the excess of the value of the subject at the port of destination over its value at the shipping port.* It is only in case of loss that the policy is of any avail to the assured, and he wishes that it may avail him in a total as well as partial loss. In the latter case, the loss may be adjusted, under an open policy, on the English doctrine, by ascertaining how much less the profit is than it would have been if the goods had arrived sound.

But in the case of a total loss by the ship never arriving, it is very difficult to say what the profits would have been had the ship arrived, since it is not possible to determine when she would have arrived; and if this difficulty is got over by assuming some probable time, there must often be a long delay in hearing from a distant port of destination, and learning the state of markets. The prompt return of his capital to the assured in case of loss, which is a very important consideration in insuring, requires a valuation of the profits, in preference to an open policy subject to an adjustment upon the English doctrine of determining the amount by the state of the market at the port of destination. The same difficulty does not arise in case of a loss on goods, which is adjusted on the invoice value. There does not appear to be any way of avoiding this difficulty but by a valuation, and this is felt in practice, since policies on profits are usually valued" (pp. 624, 625 of 175 U. S.).

This passage from Phillips, quoted with approval by this Court, entirely disposes of the greater part of petitioner's argument to the effect that because there was

an actual value at destination any insurance on that value makes the insurance an insurance on cargo.

The "increased value" here insured was, therefore, in every sense, a profit in so far as it related to any value in excess of the value at the port of shipment. The subject matter of petitioner's policy was, therefore, profits, and not cargo. And as petitioner can only be subrogated to losses in respect of the subject matter insured, it can under no circumstances claim anything in respect of the lost profits, as no profits were recovered by the assured. *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (*supra*).

POINT III.

Brown v. _Merchants Marine Insurance Co., Ltd._, 152 Fed. 411, relied upon by petitioner, is not in point.

The facts in *Brown* v. *Merchants Marine Insurance Co., Ltd.*, 152 Fed. 411, discussed at length by the petitioner are wholly different from those in the present case. It deals with hull insurance and not cargo insurance, and as there is a different method of ascertaining the value of cargo from that of hull for insurance purposes what was recently said by this Court in *Gulf Refining Co.* v. *Atlantic Mutual Insurance Co.*, 279 U. S. 708, is applicable here.

There this Court said:

> "The other American cases have dealt with insurance on hulls and so are not decisive."

Moreover, in the *Brown* case, the actual value of the

vessel insured was $140,000 (152 Fed. at p. 412) which exceeded by $48,000 the whole of the insurance there involved (which, as appears from page 31 of petitioner's brief, was only $92,000). Here the contrary is the fact: the actual value (the value at time and place of shipment) was $309,500 (R. 44), which was *LESS* by $37,000 than the aggregate of the insurance, $346,500 (R. 42-44). *The question presented here, therefore, never arose in the Brown case.* Here the question is whether two insurers, one insuring a basic risk at a value within the insurable value of the cargo, and the other insuring increased value beyond the insurable value of the cargo, should share pro rata in a fund which represents only actual value at time and place of shipment, that is, cargo's insurable value, and which is insufficient to pay them both, because one of the underwriters, the petitioner here, has elected to insure increased value in an amount beyond the insurable value. In the *Brown* case the question involved was whether a fund insufficient to pay both, not by reason of insufficiency of value of the subject matter of insurance, but because the sum recovered had been reduced because the vessel insured was also at fault for the collision, should be distributed pro rata or otherwise.

Aside from the foregoing, it may be doubted whether the decision in the *Brown* case was correct. From an examination of the opinion it appears that the Court awarded to the underwriters the whole of the recovery. It will be noted from page 31 of petitioner's brief, that the assured was a co-insurer to the extent of $48,000. There is nothing in the opinion to indicate why the Court did not award to the assured any part of the recovery. If the conclusion reached by the Court is correct, it would seem that the owner was clearly entitled to a part of the recovery. If the valuation in the disburse-

ment or increased value policies placed such underwriters in a preferential position vis-a-vis the assured, it would seem that the valuation in the hull insurance, the basic risk, would place such underwriters in a preferential position vis-a-vis the disbursement underwriters. For as regards the hull underwriters, the disbursement underwriters stand in the position of reinsurers of their coinsurer the original assured.

Moreover the conclusion in the *Brown* case to the effect that the hull underwriters were not entitled to the whole of the recovery and must share with disbursement underwriters, is impossible to reconcile with what was said by this Court in the case of *Mobile, etc. Railway Co.* v. *Jurey,* 111 U. S. 584, at pages 594 and 595:

> "Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, *and if their policy was a valued one, their payment of this value will give them the whole spes recuperandi,* and the right to the whole damages, *though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy. North of England Ins. Association* v. *Armstrong,* L. R. 5. Q. B. 244. See, also, *Clark* v. *Wilson,* 103 Mass. 219, 227." (Italics ours.)

No mention is made in the opinion in the *Brown* case of this Court's decision in *Mobile* v. *Jurey, supra.*

In the *Brown* case the hull underwriters did pay a total loss on the whole of the vessel insured. Their policies were valued policies and following what this Court said in *Mobile, etc. Railway Co.* v. *Jurey,* they were

entitled to the whole of the fund recovered. As a disbursement underwriter insures an interest other than the hull insured by the primary underwriters, he cannot stand in any better position than the assured in reference to such underwriters.

The case of the *Federal Insurance Company* v. *Detroit Insurance Company*, 202 Fed. 648, referred to on pages 27 and 32 of petitioner's brief, clearly has no application here. In that case there was no increased value insurance, nor was there any disbursements insurance. The policies involved were all hull policies on the "Etruria", and the controversy arose because some of the underwriters on the "Etruria" also had policies on the colliding vessel, the "Stone". These underwriters were opposed to suing the "Stone" because they would lose more if the "Stone" were held solely at fault than if no suit were brought. The other underwriters, who had covered the remainder of the single agreed total valuation in the hull policy on the "Etruria", insisted that the "Stone" be sued. After a recovery was effected on the basis of both vessels being at fault, the underwriters who had brought suit wished to preclude the underwriters who had objected to the suit from participating in the recovery. The Court held that they could not be denied a share in the recovery. The significant fact is that all the underwriters thus permitted to participate in the recovery were hull underwriters and had issued precisely the same form of policy and each had insured a certain fraction of the same agreed valuation.

The only cargo underwriters in the case were treated on an entirely separate basis from the hull underwriters, and were permitted recovery in full (and not proportionately) on the theory that cargo was innocent of

fault. The freight underwriters were also treated independently of cargo and in accordance with ordinary practice were made to share proportionately with the hull underwriters and the crew. There is no freight insurance or crew claim involved in the present case. The quotation, therefore, appearing on page 34 of petitioner's brief, suggesting that there was some apportionment between freight underwriters as such and hull underwriters, is misleading. The question involved here never arose in that case.

In *North of England Ins. Association* v. *Armstrong*, L. R. 5 Q. B. 244, there was a policy of insurance effected for £6,000 on the ship "Hetton", valued at £6,000. The "Hetton" was run down and sunk by the steamship "Uhlenhorst". The underwriters on the "Hetton" paid a total loss of £6,000. Later suit was brought by the owners of the "Hetton" against the "Uhlenhorst", and a recovery of £5,000 was effected. The actual value of the "Hetton" was £9,000. The Court held that the underwriters were entitled to the full £5,000 recovered, because the assured had agreed with the underwriters that the value of the property was £6,000. It follows that in the *Brown* case if the same rule had been applied the hull underwriters having agreed that the value of the ship insured was $75,000, would have been entitled to the whole of the sum recovered from the colliding vessel as the sum recovered was less than $75,000.

Some remarks (obiter) of Cockburn, *C. J.*, in that case have been criticised. See Arnould on Marine Insurance, Section 1230; *The Livingstone*, 130 Fed. 746. Arnould suggests that there was a failure on the part of the Court to understand the distinction between an abandon-

ment and a subrogation. Arnould, however, entirely approved the decision in the *Armstrong* case on the point at issue:

> "This decision is, no doubt, quite correct. The underwriters did not, in fact, recover from the 'Uhlenhorst' a sum exceeding what they had paid under their contract of insurance. Nor was the sum so recovered to any degree enhanced by the fact that the 'Hetton' was, in reality, worth more than she was valued at in the policy. Further, on the well-established principle that the policy valuation is binding in all questions as to the amount recoverable thereon from underwriters, it is clear that if the owners of the 'Hetton' had in the first instance sued the 'Uhlenhorst' and recovered 5,700£, and afterwards sued their own underwriters for 6,000£, they would have been obliged to give credit for the 5,700£ obtained from the 'Uhlenhorst'" (p. 1580, Section 1229).

Arnould's reasoning has since the publication of the last edition of Arnould (1924) been followed in *Goole* v. *Ocean Marine Insurance Co.*, L. R. (1928) 1 K. B. D, 589. In that case a ship was insured at an agreed value of £4,000. In collision she was damaged, and the cost of repairing her was £5,000. Her owners recovered £2,500 from the other ship, the recovery being reduced because both vessels were to blame. Later the owners claimed £2,500 from their underwriters. The underwriters contended that as the limit of their liability was £4,000, and as £2,500 had already been paid by the tort feasor, the amount due from them should not exceed £1,500. The Court sustained this contention of the underwriters, on the authority of *North of England Insurance Association*

v. *Armstrong, supra,* and *Thames & Mersey Marine Insurance Co.* v. *British & Chilean S. S. Co.* (1915), 2 K. B. 214.

It follows from these English authorities that if the *Brown* case had arisen in England the basic or primary underwriters would have been entitled to the whole recovery, because the recovery was less than the amount they had insured. To hold otherwise is to place an underwriter insuring an interest other than a basic risk in a better position relative to the basic risks underwriter than the assured would be if there had been no such underwriters. No good reason can be assigned for treating such underwriters preferentially to an insured.

In *Queens Insurance Company* v. *Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 493, this Court said:

> "There are special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business."

See also *Gulf Refining Co.* v. *Atlantic Mutual Marine Insurance Co.*, 279 U. S. 708, 715. We submit, therefore, that as the decision in the *Brown* case is contrary to the English authorities it should not be followed in any event. This Court in *Mobile, etc., Railway Co.* v. *Jurey*, cited the *Armstrong* case with approval. So in asking this Court to disapprove the *Brown* case we are merely requesting the Court to reaffirm what it has already said in *Mobile, etc. Ry. Co.* v. *Jurey*. But, as we have pointed out, the *Brown* case is clearly inapplicable here in any event, because the question presented by this case never arose in the *Brown* case. In the *Brown* case, all of the agreed insured values involved were less than the actual value and the value upon which the recovery was based. Here the contrary is the fact.

POINT IV.

There was no double insurance because the American Rule was incorporated by special provision in both the policy issued by the petitioner and that issued by the respondent. Under the American Rule, the petitioner's policy being subsequent in time, did not attach as to any insurance effected on the grain by the respondent, and as there could be no contribution in the loss, there can be no contribution in the recovery.

The respondent's insurance was effected before the grain became the property of Dreyfus & Company, and the petitioner's policy did not attach until the grain became the property of the Dreyfus Company (R. 42). Hence, it is obvious that the insurance of the respondent was prior in date to that of the petitioner. The petitioner's policy provides:

> "Provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy, then this Company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured; and this Company shall return the premium upon so much of the sum by them insured as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said property, subsequent in date to this Policy, this Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without the right to claim contribution from such

subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no subsequent insurance had been made" (R. 22).

The respondent's policy provides:

"PROVIDED ALWAYS, and it is hereby further agreed, that if the said Insured shall have made any other insurance upon the goods aforesaid, prior in day of date to this Policy, then the said Assurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully recovering the goods hereby insured; and the said Assurers shall return the premium upon so much of the sum by them insured, as they shall be by such prior insurance exonerated from. And in case of any insurance upon the said goods subsequent in date to this Policy, the said Assurers shall nevertheless be answerable for the full extent of the sum by them insured, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. Other insurance upon the goods aforesaid, of date the same day as this Policy, shall be deemed simultaneous herewith; and the said Assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance" (R. 47, 48).

In Winter on Marine Insurance, New York, 1919, pages 163 and 164, it is said:

"DOUBLE INSURANCE.—The next section of the printed form deals with the subject of prior, simul-

taneous and subsequent insurance. Herein is found one of the principal differences between American and British insurance practice. The clause in question reads:

'Provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid prior in day of date to this policy, then the said * * * Insurance Company shall be answerable only for so much of the amount of such prior insurance as may be deficient toward fully covering the premises hereby assured; and the said * * * Insurance Company shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said * * * Insurance Company shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said * * * Insurance Company shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance.'

Little need be said in explanation of this portion of the policy. The American theory of double insurance as herein set forth is that if insurance has been effected prior in day of date to the

policy in question the underwriter shall be relieved of all liability for loss except in so far as the prior policy is deficient in amount, not fully protecting the property insured. The insurance company agrees to return premium on so much of the amount as is over-insurance.

If there are two or more policies on the same property and aggregating in amount more than the insured value of it, simultaneous in day of date, then the various underwriters become co-insurers, each agreeing to be responsible for his *pro rata* proportion of the loss and each retaining his *pro rata* share of the premium. If the policy in question, however, is prior in date to any other policy then the underwriter agrees to assume full responsibility for loss to the amount of his policy, and is entitled to retain the full premium charged.

THEORY OF DOUBLE INSURANCE DIFFERENT IN GREAT BRITAIN.—*This principle of double insurance* is quite different *from the practice in Great Britain* where the priority of the date of a policy has no control over its validity. An assured may be very much over-insured, in fact after having placed the risk in full with one underwriter, he may again insure it with a second underwriter, each of whom is liable in the event of loss for the entire amount of his policy. The assured, however, cannot collect his loss twice and the two underwriters stand in the position of sureties one for the other, he from whom the loss has been collected having a valid claim upon the other underwriter for a ratable contribution to the loss. The English doctrine is set forth in the following words in Section 80 of the Marine Insurance Act:

80. (1) Where the assured is over-insured by

> double insurance, each insurer is bound, as between himself and the other insurers, to contribute ratably to the loss in proportion to the amount for which he is liable under his contract.
>
> (2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt'."

The parties, therefore, by their own agreements, have clearly provided that the subject-matter of the two insurances was not the same. One is insurance on cargo and the other is insurance on increased value or profits. The fact that the petitioner and its assured got over the difficulty mentioned by Phillips in the passage which we quoted from the *Canada Sugar Refining* case (pp. 29-31 *supra*), by agreeing upon a valuation of the "Increased Value" in excess of the cost and in excess of the value of the grain at time and place of shipment, does not make the two insurances risks on the same subject matter. Yet respondent's argument must go that far to succeed. For, if the subject matter of the two insurances had been the same, then there was double insurance, and there should have been contribution. But there never was a suggestion of contribution, when the loss was paid, nor could there be; how then, can there be contribution in the recovery?

If the insurances were on the same interest, and if in fact there was a real case of double insurance, there might be some justification for appellant's argument. The respondent's policy, however, is an ordinary cargo policy, and the petitioner's policy is, as stated on its face,

a policy on "Increased Value". The policies, therefore, do not cover the same interest. Irrespective of whether the petitioner's policy is strictly speculative, the evident fact is that the increased value insured does not come into existence except with respect to an arbitrary value which has no relation to time and place of shipment; a value as to time subject to an option of the assured to select any time during period of ten days after shipment; a value as to place based upon Montreal quotations. But as the fund in court does not include an increased value based upon any such criteria, such increase cannot be taken into consideration in dividing the fund in court.

The following authorities define double insurance:

"Double insurance" or "co-insurance" occurs when several policies are effected for the benefit of the same person on the same subject-matter, while "re-insurance" is effected by the insurer for his own protection. *Ocean S. S. Co.* v. *Aetna Ins. Co.*, 121 Fed. 882, 887.

The term "double insurance" means an insurance of the same interest, and is entirely different from "re-insurance", which is a contract of indemnity to the person reinsured for the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. *Providence Washington Co.* v. *Atlanta Co.*, 166 Fed. 548, 553.

Double insurance which makes a proper case for contribution between the several insurers, is where the property insured and the interest insured is identical. *Royster* v. *Roanoke Co.*, 26 Fed. 492, 494.

A double insurance exists when the same person is insured by several insurers separately in respect to

the same subject and insurance. *Lowell* v. *Safeguard Fire Ins. Co.*, 88 N. Y. 591, 597.

A double insurance is where an assured is to receive two sums, instead of one, or the same sum twice over, for the same loss, by reason of his having made two insurances upon the same ship or goods. *Thurston* v. *Koch*, 4 Dallas (4 U. S.) 348, 350.

But two insurances on the same ship, not for the same entire risk, do not constitute double insurance. Thus a policy "at and from Bayonne to the first port the ship might make in the United States" is not identical with another policy on the same ship "from Bayonne to New York". The first policy covers the time the vessel is at Bayonne, and terminates at the first port the ship might make in the United States, whether it be New York or some other port. Hence the two policies do not constitute double insurance. (*Columbian Ins. Co.* v. *Lynch*, 11 Johns. (N. Y. 233, 238, 239.)

CONCLUSION.

The decrees below should be affirmed, with interest and costs.

Respectfully submitted,

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